Supreme Court of the United States

October Term, 1971

No. .....

TREVIA RHADEDENE THOMAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Trevia Rhadedene Thomas, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, said Opinion being dated December 8, 1971.

OPINION BELOW

The Opinion of the Court of Appeals appears in Appendix "A" to this petition A petition for stay of mandate pending the outcome of the instant petition was

timely filed with the Court of Appeals.

JURISDICTIONAL STATEMENT

The judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment of the United States Constitution prohibits a federal court of appeals from refusing to examine the legality of a search made pursuant to federal law merely on the basis that the defendant has entered a plea of guilty after denial of the motion to suppress evidence.

2. Whether the illegality of a search made pursuant to federal law deprives the United States District Court of jurisdiction to entertain any criminal action incident to and founded upon the illegally obtained evidence.

STATEMENT OF THE CASE

A federal indictment was filed in the Southern District of California on August 19, 1970, charging petitioner and one Allen Robinson, in two counts, with violations of Title 21 U.S.C. § 176(a), each count naming both defendants (CT[1]

1 As used herein, CT refers to the Clerk's Transcript, RT to the Reporter's Transcript.

8). On October 8, 1970, there was a hearing and motion to suppress the evidence as illegally seized (CT 12; RT 21). This motion was denied (RT 24; CT 40). On October 15, 1970, the court, the Honorable Howard B. Turrentine presiding, filed findings of fact and an order denying the motion to suppress (CT 42-43), a copy of which is attached hereto as Appendix "B."

On November 16, 1970, a petition was filed by defendant-petitioner for reconsideration of the order (CT 47). On December 7, 1970, a superseding information was filed alleging, in one count, a violation of 26 U.S.C. § 4755(a)(1), naming only petitioner (CT 1). On the same date, petitioner was arraigned and pled *nolo contendere* (CT 2). On February 22, 1971, petitioner filed an appeal, specifically "taken from that portion of the judgment which is based upon an order of the court filed October 15, 1970, denying defendant's motion to suppress evidence . . ." (CT 5). The judgment was affirmed by the United States Court of Appeals for the Ninth Circuit on December 8, 1971.

STATEMENT OF FACTS

On August 8, 1970, petitioner and Allen Robinson were driving north through Oceanside, California, and encountered the San Onofre check point, which is 70 miles north of the Mexican border (RT 13). An inspection agent asked to look in the trunk (RT 10, 17). The keys, however, did not fit the trunk, and the car was directed to a secondary inspection area (RT 10). Agent Berry testified that he asked petitioner and Robinson to open the trunk, and again the keys would not fit (RT 11). At this point Robinson inform-

ed him that the car was borrowed and that he would call the owner to obtain the keys (RT 14, 18). Robinson also refused to give consent to open the trunk (RT 13). The agent testified that he and Robinson took out the back seat (RT 12). Robinson testified that he refused to take out the seat and went to call the owner (RT 18). After the seat was removed, the agent detected a smell of marijuana. Robinson was unable to contact the owner and was arrested while leaving the phone booth. (RT 18.)

Robinson further testified that he had borrowed the car the previous day in Los Angeles from Tena Graves, had gone to San Diego, and had not been to Mexico (RT 17, 19, 20).

The agents had no warrant (RT 15) and had no consent to search (RT 15). The agent obligingly testified that he was looking for illegal aliens (RT 12) but had no information "whatsoever" that there were illegal aliens being smuggled in this vehicle or by petitioner and Robinson (RT 13).

REASONS FOR GRANTING THE WRIT

1. **The importance of complete federal review of Fourth Amendment questions mandates that a federal forum be given a federal defendant to test on appeal the legality of a search and seizure directed at the defendant, whether or not the defendant, subsequent to denial of a motion to suppress evidence, enters a plea of guilty.**

One of the more recent cases of this Honorable Court which emphasizes the need for complete federal review of Fourth Amendment questions is *Kaufman v. United States*,

394 U.S. 217 (1969). Hopefully, it is unnecessary to emphasize the need for such review at a time when many persons fear that there has been a gradual erosion of personal liberty and privacy. It would seem equally clear that, if the Fourth Amendment is to retain its cherished vitality, a defendant, at the very least, should be able to obtain a forum for review. The present rule in the Ninth Circuit, relied on by the Court of Appeals in the instant case, is that a plea of guilty, even after denial of a suppression motion, forecloses an attack upon the legality of the search and seizure. This rule is without legislative basis, is based solely upon an incorrect interpretation of an old case, is without any founding in logic, deprives a defendant of his rights under the Fourth Amendment, hampers judicial efficiency, and indirectly involves the judiciary in a thieves' market in which constitutional rights are bartered for leniency.

The petitioner in the instant case found herself in posture not uncommon to federal defendants. Evidence which she felt was illegally seized from her was the sole evidence giving rise to federal charges lodged against her. A motion to suppress the evidence was denied by the District Court. At this point a "plea bargain" was entered into which offered leniency in the form of probation. The petitioner, of course, was required to plead guilty to the new offense alleged. The result, under the present judicially created rule, is that the petitioner lost any chance of testing further the legality of the search and seizure.

Initially, petitioner is of course aware that "plea bargaining" is a semi-sanctioned procedure designed to promote judicial efficiency. Petitioner is unwilling to accept, however,

that the price of judicial efficiency can be the abandonment or loss of constitutional rights and privacy. At the very least, the Fourth Amendment would seem to require that the least burdensome intrusion on constitutionally protected rights be incorporated into a judicial procedure. See *Kaufman v. United States, supra*. In cases similar to the instant case, allowing an accused to plead guilty and yet to retain the right to attack the prior adverse ruling on a suppression motion, would promote judicial efficiency, yet the need for a lengthy and costly trial simply to protect a constitutional claim would be avoided. Such a procedure has been recommended by Wright in *Federal Practice and Procedure* (1969) Volume 3 at page 141. Further, state procedures do exist to avoid forcing an accused "to proceed to trial just so that he can preserve his right on appeal." *United States, ex rel Rogers v. Warden*, 381 F.2d 209, 214 (2d Cir. 1967). See also California Penal Code § 1538.5(m).

The Court of Appeals relied on *Thomas v. United States*, 290 F.2d 696 (9th Cir. 1961) as authority for the proposition that the instant conviction is based on the plea and not on evidence which may have been improperly seized. *Thomas*, however, involved relief sought under 28 U.S.C. § 2255. *Thomas* cites *Berg v. United States*, 176 F.2d 122 (9th Cir. 1949), which in turn cites at page 125, fn. 7, *Weir v. United States*, 92 F.2d 634 (7th Cir. 1937), which at page 635 cites *Roberto v. United States*, 60 F.2d 774 (7th Cir. 1932). Petitioner has found no *statutory* authority for the proposition; moreover, the *Roberto* case, *supra*, in discussing a guilty plea, states at page 775:

> "Such a plea necessarily involves an admission of guilt. If such plea is inadvisably made, or

> is contrary to truth, the accused should not be held strictly to his plea."

Although stating only that a plea of guilty does not bar a subsequent appeal on jurisdictional grounds, the *Roberto* case has been interpreted to allow appeal *only* on the ground. This erroneous interpretation, although presently illogical, has taken root. Petitioner contends that there is a necessity for a serious re-evaluation of this rule, born of misinterpretation and disfavored by commentators and logic.

This attitude has also been rejected by this Honorable Court in *Kaufman v. United States, supra,* 394 U.S. 217, citing at 228 *Fay v. Noia,* 372 U.S. 391 (1963):

> " . . . conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

See also *Sanders v. United States,* 373 U.S. 1 (1963), at page 8:

> " . . . conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."

Although these cases deal with the precise question whether collateral relief will be granted in a federal court, the underlying rationale is clear to disfavor any procedure which denies full *review* of constitutional claims.

It is also important to note that a notice of appeal and application for bail pending appeal have been filed

with complete knowledge of the United States Attorney. No objection was raised at that time. There is apparently no *jurisdictional* bar to the appeal. There is merely a court-imposed bar. Moreover, the failure of the Government to object to the filing of the notice of appeal and the acquiescence of the Government in the bargained plea with knowledge of the intent of the defendant to appeal, should be deemed to act as an estoppel to its raising the objection at this time.

Moreover, it is apparent that, under the facts of this case, the guilty plea did not admit that there was a valid search, but came only after the suppression motion was denied.

The point most often raised in the cases cited above as authority for the present rule is that the plea of guilty was not based upon the illegally obtained evidence. Especially under the circumstances of the instant case, this conclusion is illogical and avoids the reality of the situation. No one can seriously doubt that if the evidence which had been seized had been suppressed there would have been no plea entered by petitioner. Only the strictest of legal gymnastics allows the contrary conclusion. The situation, in fact, is much akin to another problem in the area of the Fourth Amendment which has been resolved by *Wong Sun v. United States;* 371 U.S. 471 (1963). Just as in that case, evidence obtained subsequent to, but as a direct result of, an illegal search was the "fruit" of the prior illegal search, here, the plea of guilty is the direct result of evidence which petitioner claims to be illegally seized. The compulsion to plead guilty and waive the constitutional claim comes from the bludgeon held by the prosecution in the

form of a threat to proceed to trial on the original charge *using the illegal evidence.*

This situation gives rise to a possibly more serious problem in relation to the judiciary itself. For, in the instant case, the District Court, through its acquiescence and acceptance of the bargained plea, encouraged and abetted in the forced waiver of constitutional rights by petitioner. Whether the petitioner entered the plea voluntarily or not is irrelevant, since the entire situation was created through the United States Attorney's office in complicity with the court. The involvement of the court in this procedure, and the allowance of probation as part of the deal, casts the court in the role of merchant, not judiciary. The courtroom thus becomes a marketplace where an accused can trade his constitutional rights for leniency.

2. The illegality of the search directed against petitioner deprives the United States District Court of jurisdiction to entertain any criminal action incident to the illegally seized evidence.

Aside from the reasons cited above, there is a further compelling reason for requiring that a forum be offered to test on appeal the legality of the search in the instant case.

The necessary implication of *Kaufman v. United States, supra,* is that the error in admitting evidence in violation of the Fourth Amendment is one of jurisdictional magnitude and, for that reason, is reviewable under 28 U.S.C. § 2255. Thus, the District Court in the instant case never

obtained jurisdiction over any criminal activity of petitioner unless the seizure was legal. Petitioner, however, has been unable to test the legality of the seizure, and thus is unable to test the jurisdiction of the District Court. As in *Kaufman v. United States, supra,* the Fourth Amendment would seem to require that a forum for review of this jurisdictional claim be granted, even in the face of the rule of *Thomas v. United States, supra.* Obviously, this problem goes to the very heart of the legal basis for the instant conviction.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and that the Order of the United States Court of Appeals for the Ninth Circuit dated December 8, 1971, should be vacated.

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN &
SCHWARTZ

Attorneys for Petitioner

APPENDIX

"A" Opinion of the United States Court of Appeals For the Ninth Circuit, Dated December 8, 1971.

"B" Findings of Fact and Order of the United States District Court for the Southern District of California, dated October 15, 1970.

APPENDIX "A"

OPINION OF THE COURT BELOW

United States Court of Appeals, for the Ninth Circuit.
No. 71-1556.
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v. TREVIA RHADEDENE THOMAS, Defendant-Appellant.

[FILED December 8, 1971]

ORDER

Before: HUFSTEDLER and TRASK, Circuit Judges, and FERGUSON,* District Judge

We adhere to the established law of this Circuit that appellant's guilty plea forclosed her attack upon the legality of the search and seizure (*e.g., Thomas v. United States* (9th Cir. 1961) 290 F.2d 696); accordingly, the judgment is ordered AFFIRMED.

*Hon. Warren J. Ferguson, United States District Court, Central District of California, sitting by designation.

APPENDIX "B"

FINDINGS OF FACT AND ORDER

In the United States District Court for the Southern District of California.

Case No. 9609 Criminal.

United States of America, Plaintiff, v. Trevia Rhadedene Thomas, aka Trevia Cooksey, Allen Alpheries Robinson, Defendants.

[Filed - October 15, 1970]

The defendant having filed a motion to suppress, the Government having responded, evidence having been presented at a hearing on said motion on October 8, 1970, the following constitute this Court's findings of facts:

(1) That on August 8, 1970, at about 3:10 a.m., the defendants entered the Border Patrol checkpoint at San Onofre in a 1967 Ford.

(2) After the defendants were directed to the secondary area, the defendants were asked to open the trunk to which they replied they did not have a key.

(3) Border Patrol Agent Berry removed the rear seat of the Ford and immediately smelled and observed a quantity of marihuana in the trunk.

(4) The defendants were then arrested.

Based on these facts, it is the finding of this Court that probable cause existed for the arrest of the defendants and the seizure of the 106 pounds of marihuana.

The defendants motion to suppress is hereby denied.

IT IS SO ORDERED.

HOWARD B. TURRENTINE
United States District Judge

Presented by: Harry D. Steward, United States Attorney; Robert H. Filsinger, Assistant U. S. Attorney, Chief, Criminal Division; [signed] Howard B. Frank Assistant U. S. Attorney.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JANUARY 4th, 1972, I served the within PETITION FOR WRIT OF CERTIORARI (THOMAS v. UNITED STATES) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543

UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
301 U. S. COURTHOUSE
325 WEST F STREET
SAN DIEGO, CALIFORNIA 92101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 4th, 1972, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 COPIES TO: SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

No. 71-878

In the Supreme Court of the United States

OCTOBER TERM, 1971

TREVIA RHADEDENE THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERWIN N. GRISWOLD,

Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-878

TREVIA RHADEDENE THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 19, 1970, petitioner and one Allen Robinson were indicted in the Southern District of California for smuggling marijuana in violation of 21 U.S.C. (1964 ed.) 176(a). On October 8, 1970, a motion to suppress the 106 pounds of marijuana seized at an inspection station from a car which petition was driving was denied after a hearing (Pet. App. B). On December 7, 1970, pursuant to a plea bargain, a superseding information was filed charging petitioner with importation of marijuana without

having registered and paid a special tax, in violation of 26 U.S.C. (1964 ed.) 4755(a)(1). Petitioner, on the advice of counsel, pleaded guilty. She was sentenced to three years' imprisonment, imposition of which was suspended on condition that she spend the first six months in a jail-type institution and then be placed on probation for three years. The court of appeals affirmed the conviction *per curiam* (Pet. App. A).

Petitioner contends that she should have been permitted on appeal to litigate the merits of the search and seizure claim. As the court below held, however, a voluntary guilty plea waives the right later to attack all nonjurisdictional defects. This rule has been consistently applied to bar the assertion of search and seizure claims.[1] See *Thomas* v. *United States*, 290 F.2d 696 (C.A. 9), certiorari denied, 368 U.S. 964; *Hughes* v. *United States*, 371 F.2d 694 (C.A. 8); *Alexander* v. *United States*, 290 F.2d 252 (C.A. 5), certiorari denied, 368 U.S. 891; *Edwards* v. *United States*, 256 F.2d 707 (C.A.D.C.), certiorari denied, 358 U.S. 847. Moreover, contrary to petitioner's contention, an otherwise valid guilty plea is not rendered involuntary when a defendant, on advice of counsel, pleads guilty to a lesser crime in order to limit the possible penalty to less than that authorized

[1] There is no merit to petitioner's second contention that her search and seizure claim is one of jurisdictional magnitude. Petitioner was convicted on her own guilty plea, not on the admission of tainted evidence. See *Machibroda* v. *United States*, 368 U.S. 487, 493; *Kercheval* v. *United States*, 274 U.S. 220, 223.

for a conviction after trial, or because the defendant fears conviction as a result of the introduction of certain alleged illegally obtained evidence. See *Brady* v. *United States*, 397 U.S. 742; *McMann* v. *Richardson*, 397 U.S. 759, 768-774; *Parker* v. *North Carolina*, 397 U.S. 790.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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[2] In any event, the search in the instant case was proper. The evidence at the hearing on the motion to suppress showed that on August 8, 1970, petitioner, accompanied by Allen Robinson, drove into the border patrol checkpoint on Highway 5 at San Onofre, California, about seventy miles from the Mexican border (R.T. 10). The immigration officers desired to look into the trunk of the auto to search for aliens. They were told by petitioner and Robinson that they did not have the keys to the trunk. An agent, assisted by Robinson, then proceeded to remove the back seat so that the trunk could be seen. After the rear seat was removed, the agent immediately noticed the strong smell of marijuana and observed what appeared to be packages of marijuana in the trunk of the car. Petitioner was then arrested and approximately 106 pounds of marijuana were removed from the vehicle (R.T. 11-12).

Since petitioner did not product the keys to the trunk, the way in which the officers sought to determine its contents was a reasonable search. See 8 U.S.C. 1357; *Fumagalli* v. *United States*, 429 F. 2d 1011 (C.A. 9); *Barba-Reyes* v. *United States*, 387 F. 2d 91 (C.A. 9); *Fernandez* v. *United States*, 321 F. 2d 283 (C.A. 9).

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